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The Struggle Against Torture: Challenges, Assumptions and New Directions

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Abstract

This short essay offers a broad and necessarily incomplete review of the current state of the human rights struggle against torture and ill-treatment. It sketches four widespread assumptions in that struggle: 1) that torture is an issue of detention and interrogation; 2) that political or security detainees are archetypal victims of torture; 3) that legal reform is one of the best ways to fight torture; and 4) that human rights monitoring helps to stamp out violence. These four assumptions have all played an important role in the history of the human rights fight against torture, but also resulted in limitations in terms of the interventions that are used, the forms of violence that human rights practitioners respond to, and the types of survivors they seek to protect. Taken together, these four assumptions have created challenges for the human rights community in confronting the multiple forms of torture rooted in the deep and widespread inequality experienced by many poor and marginalized groups. The essay ends by pointing to some emerging themes in the fight against torture, such as a focus on inequality, extra-custodial violence, and the role of corruption.

Keywords: corruption; inequality; perpetrators; victims; violence

The prohibition of torture has been at the heart of human rights activism for much of the last 50 years, if not before. There is an important sense in which the campaign against torture has been one of the most successful in the history of human rights. It was its Campaign Against Torture that, arguably, not only won Amnesty International the Nobel Peace Prize, but also helped make human rights campaigning a popular concern in many parts of the world. Partly thanks to this campaign, the prohibition of torture now has its very own UN Convention. The fight against torture also has its various regional and international mechanisms, such as the Committee for the Prevention of Torture in Europe, or the Committee against Torture and the Sub-Committee for the Prevention of Torture at the UN. Across the globe, there are hundreds of organizations, both large and small, that have made the fight

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against torture central to their mission. The two largest umbrella groups for anti-torture organizations have members in virtually every country in the world. Very few states, if any, would openly admit to torturing, and we are reasonably close to an international consensus that torture is not only wrong, but legally prohibited. Although some people still like to argue over whether 'torture works', the meaningful debate that does exist tends to focus on whether particular acts count as torture, not whether torture is right or wrong. The last decade has also seen an increasing number of criminal prosecutions for the specific crime of torture, usually under the principle of universal jurisdiction. There are very few human rights that might be able to claim this level of success. There are multiple reasons why the prohibition of torture, of all rights violations, has had such success in the human rights field—at the normative level at least. Partly it is to do with mid-twentieth century cold war politics, where regimes from both the right and left could be accused of torture. And partly it is to do with the way that torture, understood as having particular perpetrators and victims, fitted particularly well with human rights naming and shaming techniques. Either way, the fight to establish norms around the prohibition of torture has been one of the success stories of the human rights movement.

Yet, at the same time, despite, or perhaps even because of, these many notable achievements, doubts and disappointments still remain. Torture and ill-treatment is still all too widespread across the globe, very few people are still held to account for its infliction, and survivors are all too often, despite the best efforts of many activists and professionals, denied the support, protection and rehabilitation that they need. Over the last 20 years, in much of Europe and North America at least, public discussion of torture has been dominated by the 'war on terror'. Abu Ghraib, Bagram, Guantánamo, CIA black sites, and extraordinary rendition have all played out across the headlines. And in the responses to these particular events we can see many of the challenges involved in human rights work against torture. The events in Guantánamo and beyond, and the responses to them by many governments, have contributed to the risk of norm erosion, and created a ready-made excuse for any state torturing the people under its care. Moreover, very few, if any, people have been held to account for what went on, and the officials who facilitated such abuses have not only failed to appear before courts of law, but have continued, in many cases, with very successful careers. At the level of public discussion there has been an all too common assumption that the torture chambers of Afghanistan and Iraq were some kind of aberration, running against the grain of a longer process of gradual eradication. In this process, the much longer history of torture by states such as Britain and the USA, in Northern Ireland, the Philippines, Kenya, Cyprus, Viet Nam and Latin America, has been overlooked. There has been too much of a sense that Abu Ghraib was a mistake, or the actions of a few rogue people, rather than part of a much wider and systemic process. The focus on the events in a few places of detention, abhorrent as they might be, has also taken attention away from the wider forms of violence that have marked the 'war on terror' and beyond.

This short essay offers a broad and necessarily incomplete review of the current state of the human rights struggle against torture and ill-treatment. It is meant as a personal and inevitably partial take on the field. It starts by sketching four key widespread assumptions in the human rights struggle against torture and their possible implications for the ways in which we respond to deliberately inflicted violence carried out in the name of public officials. These assumptions are: 1) that torture is an issue of detention and interrogation; 2) that political or security detainees are archetypal victims of torture; 3) that legal reform is one of the best ways to fight torture; and 4) that human rights monitoring helps to stamp

out violence. The overall argument of the essay is that, taken together, these four assumptions have created challenges for the human rights community in confronting the multiple forms of torture rooted in the deep and widespread inequality experienced by many poor and marginalized groups.

To point to these four assumptions might be to risk pointing out the obvious, so central are they to much contemporary anti-torture work. Yet it is worth remembering that these approaches should not be taken for granted and that the centre of gravity of anti-torture work could have gone in other directions. Importantly, it is also not to suggest that these assumptions are the only game in town, or that their limits are not widely acknowledged by many people who work in the human rights field. There are many important countercurrents and processes at play in a broad and varied field. Nevertheless, the four assumptions set out below have all played an important role in the history of the human rights fight against torture.

Pointing to the limits created by these assumptions is not to imply that the assumptions are wrong or misplaced. There is evidence that many practices based on these assumptions have worked, at least in their own terms (Carver and Handley 2016). There can be no doubt that torture often happens in places of detention, political detainees have been victims of the most horrific acts, and both normative legal developments and human rights monitoring have helped shift the behaviour of states. But very few people would deny that there is more than this to the fight against torture. More importantly, we should also not assume that the fight against torture is a fixed target. Even as human rights techniques develop, torturers create new modes of violence that sidestep or avoid human rights practices. We therefore need to remain constantly vigilant to the shifting terrain within which human rights practices work. One sobering implication of the arguments below is that the scale and scope of torture and ill-treatment is probably far larger than the incidents that currently come into the view of human rights organizations. Critically examining assumptions also risks replacing old assumptions with new, illuminating old blind spots at the cost of creating new ones. The key point, though, is the need for careful and constant reflection on our assumptions, and the ways in which they may or may not systematically exclude specific forms of torture, cut out opportunities for improvement, and prioritize particular groups of survivors over others.

Four assumptions about torture and their possible limits

Detention

The first assumption is that torture is tightly linked with detention. Many attempts to prevent torture have focused on prison cells and police investigations. Torture is often heavily associated with the interrogation process, either to collect evidence or simply to intimidate or coerce. This is part of a much longer history, going back to the abolition of judicially sponsored torture in eighteenth and nineteenth century Europe. The association of torture with detention and interrogation runs through much human rights work. In a recent reflection on his decades-long involvement in the fight against torture, for example, Manfred Nowak, the former UN Special Rapporteur on torture, wrote that more than 90 per cent of the torture victims he has interviewed were tortured under criminal investigation (Nowak 2018). Similarly, a recent large-scale study of torture prevention techniques limited its analysis to people detained in formal custody (Carver and Handley 2016).

However, a focus on places of detention, even when understood very broadly to include places like hospitals and immigration detention, risks limiting the places that we look for torture and ill-treatment. If we link torture, as opposed to ill-treatment or other forms of excessive violence, to the specific experience of powerlessness (Nowak 2006), in a world marked by gross inequality, detention is not the only place, or even the most extreme place, where people can be powerless. It might well be that most of the people identified as torture survivors by human rights actors have been in detention because that is where human rights actors look for them. We need to make sure we do not do the metaphorical equivalent of only looking for our lost car keys under the street light on a dark night, as this is the only place we can see, rather than where we actually left them. There is a body of evidence that suggests extra-custodial violence by agents of the state is probably a more common experience than being beaten in a police station (Hornberger 2013; Jauregai 2013; Larkins 2013; Wacquant 2003). Street vendors, the homeless, sex workers or the unemployed, as well as members of ethnic, sexual or religious minorities, as they go about their everyday lives, routinely experience violent harassment by police officers and other public authorities that easily tips over into torture, but never gets anywhere near a police station or jail. Extrajudicial and extra-custodial punishment, intimidation, corruption and crowd control are an everyday fact of life for many people, whether this is on the streets of Chicago, Delhi, Nairobi, or other places. Indeed, in many states, being taken into detention is a relative privilege. State violence is as likely to happen on the street or in people's homes as it is in police cells or even in the back of the van. This might be because state institutions are under-resourced, or it might be because monitoring processes have driven violence out of the places that are relatively easy to monitor. Detention monitoring has made violence in prisons or police stations more difficult, but public authorities have responded by taking that violence elsewhere. In response, in the last few years, an increasing number of human rights practitioners have begun to think through the forms of torture that might take place outside spaces of detention (UN General Assembly 2017). Rather than spend time thinking in detail about whether a particular activity counts as a form of legal custody or not, if we want to prevent torture it is probably more productive to focus on the relationships through which people are placed at risk of torture and ill-treatment.

Exceptional survivors

Historically, anti-torture work has often emphasized political and security detainees. In this vision, survivors of torture are somehow exceptional. Torture survivors were widely seen as heroic in the context of the human rights struggle for those detained for opposing the regimes in Chile, Argentina, South Africa or the Soviet Union, and it is in this context that anti-torture work arguably first rose to prominence as a distinct international human rights concern (Fassin and Rechtman 2009). Amnesty International's Campaign Against Torture, partly for strategic reasons of gaining most attention, also sought to put the focus on specific relatively high-profile individuals. At the same time, also with good reason, the psychosocial needs of torture survivors were also often seen as specific, with torture seen as a very particular and egregious form of trauma, motivating the establishment of numerous torture rehabilitation centres round the globe. More recently, there has been more of an emphasis, at least in some parts of Europe and the USA, on the link between torture survivors and a perceived security threat. In the context of the so-called 'war on terror', torture is

justified on the grounds that the victim somehow has particularly significant, critical, and exceptional knowledge.

However, either way, focusing on torture survivors as exceptional people risks missing out on those survivors who might be more 'mundane'. At an international level many human rights organizations, under considerable pressure, have done important work in defending the rights of 'security' detainees. More broadly though, if torture does not only happen in places of detention, it is not only political detainees that are tortured. As anti-torture organizations have long recognized, people picked up under suspicion for relatively low-level criminal acts probably make up the vast majority of people beaten in police cells. As the former UN Special Rapporteur on torture noted, 'most of the victims of arbitrary detention, torture and inhuman conditions of detention are usually ordinary people who belong to the poorest and most disadvantaged sectors of society' (UN General Assembly 2009). This is a point that has been repeated by successive Special Rapporteurs, but the fact it is repeated so often is perhaps an indication that people need reminding.

The poorest and most disadvantaged in society can find it particularly hard to fit into the heroic frame for torture survivors. Sometimes this is because moral compromises are often forced on the poor and the marginalized as they struggle to survive, to make a living and support their loved ones. Perhaps more importantly, members of marginalized and stigmatized groups, whether they are unemployed young men, members of sexual minorities, or the urban poor, are particularly vulnerable to violence from state officials. Yet, at the same time, for the very same reasons they are vulnerable to violence in the first place, it can also be difficult to create public sympathy for these people. In situations where the experience of torture and other forms of ill-treatment can be an all too common and taken for granted aspect of the encounter between the marginalized and public officials, we need to be careful that the relatively less spectacular forms of torture, and the seemingly less virtuous survivors, are not forgotten (Jensen, Kelly et al. 2017).

Legal reform

If the first two assumptions were linked to how we understand the places where torture takes place and the people subjected to it, the next two assumptions are linked to the ways in which we fight torture. The third assumption is that the prohibition of torture is a matter of legal reform, and that one of the best ways to eradicate torture is to change the law. Again, this is part of a much longer history, going back to the eighteen and nineteenth centuries, and changes in the laws of evidence that eventually led to the formal abolition of judicial torture. What was new in the late twentieth century was the attempt to produce an internationally agreed definition of torture which saw its culmination in the 1984 UN Convention against Torture. The assumption was that if torture was the product of a legal regime, then the legal regime needed to be changed, and changed through the development of new legal norms. As part of this, impunity was seen a major cause of torture, and therefore torture had to be comprehensively criminalized. The campaign for universal criminal jurisdiction was also a key aspect of this process. In general, legal reform has been an important part of the fight against torture, serving to restrict and limit the spaces where torture is possible and it acted as a serious deterrent.

However, a focus on legal reform and the development of new legal norms risks turning the eradication of torture into a technical process, ignoring the political contexts within which it takes place. Indeed, a recent comprehensive study has shown that legal reforms are

often ineffectual (Carver and Handley 2016). At one level, creating a formally perfect legal system, with perfect laws, can be highly ineffectual in contexts of political impunity and under-resourced legal mechanisms. At another level, recent history has shown us the ways in which legal reform does not always simply eradicate torture but shifts the ways in which it takes place. The most obvious example of this is the ways in which the Bush regime in the USA developed complex legal mechanisms during the 'war on terror' to enable them to carry out acts that most people call torture. Darius Rejali (2007) has shown the ways in which liberal democracies have developed their own new torture techniques, precisely in response to legal prohibitions. This is not to say that such legal prohibitions are unimportant, but it is to say that states will also devote their energies to sidestepping them. There is a sense that the more complex the law, the more legal game-playing is made possible, and the more the argument shifts towards legal technicalities and away from the causes and consequences of acts of torture. We can keep tinkering with a legal regime, making its provisions more complex, but there comes a point when this becomes counterproductive, if it fails also to take into account the political context within which torture takes place. The point here is not that law is ineffectual, but that it can be effective in unexpected ways. More law does not lead to less violence, and legal regimes, even liberal legal regimes, have historically played an important role in legitimating particular forms of violence. Furthermore, law might hold up the promise of clarity, precision and enforcement, but also creates its own limits, abstracting us from the complex ways in which torture is inflicted and experienced on the ground. In doing so, it can bracket torture off from the wider forms of violence within which it is embedded, and thereby limit our ability to understand the causes and consequences of torture (Parry 2010).

Monitoring

The fourth assumption is that monitoring shifts behaviour away from torture. Monitoring can take a non-accusatory form, or a more public form of shaming, often associated with human rights campaigning. The broad assumption here is that torture is a problem of knowledge, that we can eradicate torture by shining a light into the dark recesses where it happens. And through shining the light of human rights work, we can either shame people into behaving differently, or educate them into doing so. Torture is often, although not always, seen as taking place either because people do not (yet) know it is wrong, or because the right people at the right time do not know it is happening. If more of the right type of people know it is taking place, it is widely hoped that it will be less likely to happen.

But monitoring clearly has its limits as a model of change. What happens in contexts where people know about torture and do not care that it is taking place—and perhaps even endorse its use on particular groups, such as alleged criminals—or know about it, but due to factors outside their control may be unable to prevent it taking place? The Assad regime in Syria, or the use of torture in Guantánamo, might be examples of the former, whilst governments such as those in Somalia or the Democratic Republic of Congo (DRC) might be examples of the latter. At another level, we need to pay particularly careful attention to the spaces that are monitored. Detention monitoring is no longer limited to police stations and prisons, but also includes hospitals and secure units, amongst many other places. And effective monitoring is, in principle, designed to seek out hidden places where torture might be happening. But these hidden places can, by definition, be hard to reach and to know about. And in practice, in a point linked to the first assumption above, there is a danger of

assuming that torture takes place in locations that can be formally identified and visited. Yet, for many people, especially in states marked by chronic instability (and even some that are not) torture and ill-treatment is not linked to specific spaces, but rather is rooted in specific relationships and encounters, which can take place in a host of unpredictable places and ways. The example noted above of the street vendor or the sex worker constantly harassed and subjected to violence by the police comes to mind. There is a danger that monitoring can miss large numbers and whole categories of survivors in a systematic way.

Furthermore, monitoring partly assumes that it is good for the experiences of survivors to come to light, for the outside world, in some form, to know what has happened, even if the monitoring process is not widely and publicly available. But we might also ask what happens when survivors, for multiple possible reasons, do not want their experiences to be known (Jensen, Kelly et al. 2017). In some situations survivors can be too scared to come forward, or see little practical purpose in exposing what they have been through. Rather than having a light shone on their experiences, they might want to hide away, fearful of possible stigma or repercussions, lacking confidence that the legal system or even human rights actors can offer them the type of practical support or forms of justice they might be after. Whilst preventative monitoring is not aimed at putting the individual in the spotlight, and instead tries to focus on the overall situation, this relies on a great deal of trust on the part of survivors in relation to human rights groups, a trust that is often missing. Either way, the logic of shining a light partly assumes that the result will be some sort of redress or change in behaviour, but this is far from always being the case. In some cases, it certainly might be, but in general the numbers of criminal prosecutions are very low and awards of compensation few and far between. The risks of exposure, however delicately handled by human rights actors, can be very high for many survivors, especially those from already marginalized backgrounds.

New challenges in the fight against torture

Torture, like other forms of violence, is rooted in social relations and differences in power, rather than simply in cultural norms or individual pathology. The actions of public officials are not simply governed by formal legal rules and relationships, but can also be carried out as a result of multiple, more diffuse, and often informal, aspirations, norms and assumptions and multiple institutional rationalities (Jefferson 2009). Alongside formal legal norms, we also need to be careful to take other norms, expectations and relationships into account. Perhaps more importantly, though, it is not just norms and affiliations that can influence behaviour, but also the structural conditions under which they work (Jensen and Jefferson 2009). If torture is the product of particular relationships, gender, class, and race, amongst other things, can make a crucial difference. People living in poor communities, for example, are often particularly vulnerable to torture by law enforcement agents and their proxies (Dissel et al. 2009). Importantly, it is not just that poverty in and of itself that is an issue, but relative forms of poverty in particular, and the inequalities that this can produce.

The challenge for those involved in the struggle against torture is to strengthen modes of intervention that go beyond long-standing models that have been developed in the context of authoritarian regimes in Europe and the Americas. It is crucially important though that, at the same time, poverty or cultural difference is never used as an excuse for torture. Either way, we should not assume that the institutional techniques that work in relatively high-income settings, or in states with relatively high levels of institutional capacity, can be

simply transferred to the world's poorest countries or places marked by chronic forms of instability. Nor should we assume that the drivers and causes of torture will be the same in all places at all times. And we also need to think carefully about the ways in which exposure to torture is linked to gender, as well as to class and race. The balance between particular and contextual responses on the one hand, and universal principles on the other, is not an easy one to strike, but if it is done successfully, one key outcome can be the transfer of models and interventions not just from the global North to the global South, but the other way as well. Britain has as much to learn from the Philippines as the other way around. It is of crucial importance that we constantly question our assumptions in the fight against torture, including the assumptions laid out in this essay, lest they lead to systematic blind spots at the expense of particular groups of people. A pluralist approach, or one that looks at the problem of torture from multiple directions, is therefore essential.

Emerging work on the relationship between torture and corruption has been particularly important in tackling the relationship between torture and inequality and challenging ingrained assumptions (Jensen and Andersen 2017). This is not to suggest that the fight against corruption is the same as the fight against torture. Nor is it to downplay the very important differences between the two issues. Rather it is to suggest, by focusing on one very particular example amongst many others, the benefits of looking at torture in new ways, and in particular in placing it in the context of the dynamics of wider social relations and inequalities that stretch far beyond places of detention. Torture and corruption have long been addressed in both academia and policy circles as two separate domains of knowledge and practice—as examples of gross human rights violations or bad governance respectively. Yet not only can corruption and torture proliferate in the same spaces, but corruption can also lead to torture, and vice versa. If we understand corruption as involving the coercion or exploitation of other citizens by public officials for personal ends or on behalf of political and economic (elite) interests, the relationship with torture becomes clear. In the context of low salaries and limited state resources, corruption can be a key way in which public officials provide for themselves, their dependants, or the institutions within which they work. Corruption is also shot through with locally specific norms and expectations around behaviour. One danger of using corruption as a lens through which to combat torture is that we reproduce similar assumptions that have run through the fight against torture, such as the belief that more and better laws are the best way to combat abuse. However, the pairing of the struggle against corruption and the struggle against torture also offers exciting new opportunities as it allows us to get outside places of detention, understand the causes and consequences of torture in the context of specific relationships, and most importantly to put inequality at the top of the agenda.

In response to these challenges in the fight against torture, a growing number of anti-torture organizations, often, but not only, those based across the global South, have been taking what Danielle Celermajer (2018) has described as a 'pragmatic approach' to torture prevention. This is one that seeks to understand the conditions within which people work and to provide new skills and incentives, whilst keeping a broader eye on systemic issues. Focusing on judicial issues alone, for example, might fail to acknowledge these practical constraints and structural problems under which torturers work. A pragmatic approach is not without its difficulties, not least that in focusing on what can get done in specific situations, there is a danger of making too many compromises and losing track of the overarching normative commitment against torture. Means can sometimes get confused with ends.

Whatever the case, we still need to put torture back into the context within which it emerges as part of a broader spectrum of violence rooted in various form of inequality.

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